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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. _____

ADA L. BURROUGHS, AND JAMES CANNON, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of the District of Columbia.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

PART I.

I.

The petitioners herein deeming themselves aggrieved by a decision of the Court of Appeals of the District of Columbia in a case in which they were the appellees and the United States of America was the appellant respectfully petition your Honorable Court to grant a writ of

certiorari for the review of said decision and judgment and for reasons why such writ of certiorari should be granted respectfully show the following.

II.

History of the Case

The case is one of first impression arising under the sections of the Federal Corrupt Practices Act of February 28, 1925, relating to contributions and expenditures made for the purpose of influencing the election of presidential electors in two or more states; requiring political committees to be appointed and the treasurer thereof to file reports with the Clerk of the House of Representatives.

Petitioner Ada L. Burroughs, as treasurer of a political committee, known as the Headquarters Committee Anti-Smith Democrats, is charged in the indictment (R. p. 1) returned by a grand jury of the District of Columbia, under the Federal Corrupt Practices Act of February 28, 1925 (U.S.C. Title 2, Chap. 8), with failure to file with the Clerk of the House of Representatives of the United States written reports of contributions alleged to have been made by one E. C. Jameson for said political committee. Petitioner James Cannon, Jr., is charged, in each count, with aiding and abetting petitioner Burroughs in failing to file such reports. It is charged that the money was contributed for the purpose of influencing and attempting to influence the election of Presidential and Vice-Presidential electors in two states.

The indictment contains ten counts (R. p. 1). The 1st, 3rd, 5th, and 7th counts charge the petitioners with feloniously failing to file the reports on the different dates specified in the statute.

The 2nd, 4th, 6th and 8th counts charge the petition-

ers with unlawfully failing to file reports on the respective dates specified in the statute.

The 9th count charges the petitioners with conspiring to commit the substantive alleged felonies charged in the preceding 1st, 3rd, 5th and 7th counts by failing to file the reports on the dates specified, while the 10th count charges a conspiracy to commit the substantive misdemeanors charged in the preceding 2nd, 4th, 6th and 8th counts by failing to file reports on the dates specified.

In no one of the ten counts of the indictment is any allegation that any contribution of money was made to either of the petitioners or to the said political committee or to any agent of the committee. Nor does any count contain an allegation that either defendant had knowledge of any contribution.

The indictment charges indirect contributions by one, E. C. Jameson, for said political committee, but fails to allege that the said Jameson contributions were reported or accounted for to said Burroughs, the treasurer of said political committee, or that she had knowledge thereof.

Petitioners demurred to the indictment on the grounds that the sections of the Federal Corrupt Practices Act upon which the indictment is based are unconstitutional insofar as they attempt to require reports of contributions and expenditures made to influence the election of Presidential and Vice-Presidential electors in the several states, this power being reserved exclusively to the states, under Sec. 1, Art. II of the Constitution of the United States; also that the provisions of the act are violative of the rights reserved to the people or to the states under the IX, X and XII amendments to the Constitution of the United States. Further grounds of demurrer were that the indictment failed to state any offense under the statute, properly construed. More specifically, that there was a failure

to allege facts which show, or from which may be inferred, the commission of any offense against or violation of the Federal Corrupt Practices Act, or any other Federal statute, in that there was a failure to charge (1) who constituted the alleged political committee; (2) to whom the alleged contributions were paid; (3) that the alleged contributions were ever **received by the treasurer**; and (4) that the treasurer ever **had knowledge** of any such contributions (R. pp. 16-21).

After argument in the Supreme Court of the District of Columbia a memorandum opinion was filed and judgment entered (R. pp. 21, 22) sustaining the demurrer. The court did not pass upon the constitutional questions raised but held that the indictment failed to charge any offense under the statute as construed by it.

The United States noted an appeal to the Court of Appeals of the District of Columbia (R. P. 22). Petitioners filed a motion to dismiss for want of jurisdiction on the ground the appeal should have been taken directly to this court under the Criminal Appeals Act (Sec. 682 Title 18 U. S. Code) which motion was overruled. Later after the case had been fully argued upon the merits, the Court of Appeals of the District of Columbia under section 239 of the Judicial Code, certified the question of its jurisdiction of the appeal to this court. In an opinion and judgment entered April 10, 1933 (United States vs. Burroughs, No. 683, October Term, 1932, not yet officially reported), this court answered and held that the Court of Appeals did have jurisdiction, whereupon that court in an opinion concurred in by three Justices, one Justice dissenting, and one having recused himself, reversed the decision and judgment of the Supreme Court of the District of Columbia and entered judgment remanding the case for trial (R. p. 34). Petition for rehearing (R. p. 37) being denied (R. p. 38).

III.

Points of Law Involved

The principle contentions made by the petitioners in the Court of Appeals of the District of Columbia are set forth in the grounds of the demurrer (R. p. 16).

I. The provisions of the Federal Corrupt Practices Act relating to Presidential electors are unconstitutional. The power to appoint presidential electors and to regulate the acts of citizens affecting their appointment is by the Constitution, Art. 11, Sec. 1, reserved to the states.

II. Even if the Federal Corrupt Practices Act be constitutional the indictment is insufficient to charge an offense under it since it merely alleges contributions "for the committee" without alleging to whom made, that they were accepted by the committee, or that the treasurer had knowledge thereof.

IV.

Reasons Why Writ Should Be Granted

A. The case involves a constitutional question of national importance viz., the power of Congress to regulate the acts of citizens attempting to influence the election of presidential electors. This has long been the subject of discussion and consideration by committees of Congress.

B. The case is one of first impression arising under the sections of the act relating to presidential electors.

C. The Court of Appeals has not given effect to applicable decisions of this Court.

D. Even should the act be constitutional the question of its construction with respect to the responsibility of the treasurers of political committees is of

equal public importance. In this case five Judges have construed the act, one Justice of the Supreme Court of the District of Columbia and one Justice of the Court of Appeals held the indictment did not state an offense under the act properly construed. Three Justices of the Court of Appeals have held to the contrary.

E. The law on this subject should be definitely settled for the entire country.

V.

The Facts and the Law of the Case

Only the sections of the Corrupt Practices Act of February 28, 1925, relating to presidential electors are involved in the case. The present Federal Corrupt Practices Act was enacted by Congress following the decision of this court in Newberry v. United States, 256 U. S. 232, holding the former act unconstitutional. It marks the first attempt by Congress to regulate the acts of citizens in connection with campaigns for the election of Presidential electors, prior legislation on the subject (aside from the act of January 26, 1907, relating to corporations) having been confined to acts affecting the election of members of Congress for which express authority was conferred by Article 1, Sec. 4 of the Constitution but which this court held in the Newberry case supra, did not confer any implied power to regulate primaries at which candidates for Congress are nominated.

Petitioners contend that the Constitution of the United States, Art. II, Sec. 1, expressly commits to the Legislatures of the several States the power of appointment of Presidential electors. It reads:

> "The executive power shall be vested in a President of the United States of America. He

shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

"Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. * * *

"The Congress may determine the Time of Chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

This right was assured by the IX and X Amendments and retained in the XII Amendment. This power of the State Legislature is full, complete and plenary. Where the framers of the Constitution intended that Congress should have any authority with respect to Presidential electors they provided for it in express terms as in Art. II, Section 3, to fix the "time of choosing and the day on which they shall give their votes" which is required to be the same throughout the United States.

This Court has settled that where the Legislature has provided for the election of presidential electors by popular vote of the people of a state it is nevertheless an "appointment" within the meaning of Art. II, Sec. 1, of the Constitution. McPherson v. Blacker, 146 U. S. 1. Acts of citizens influencing their selection at a popular election, affect their "appointment" which is a function expressly and specifically committed to the states. Fitzgerald v. Green, 134 U. S. 377. The elastic clause, Art. I, Sec. 8, clause 18, relied upon by the majority opinion of the Court of Appeals cannot give rise to an implied power to regulate a function vested by the Constitution in the States nor to punish

acts of citizens affecting the discharge of a constitutional prerogative belonging exclusively to the States.

The statute and the indictment in the instant case deal only with acts influencing the appointment of presidential electors before the individual has become an elector and at a time when the whole subject of the appointment and of acts affecting it is within the exclusive power of the State. There is no power in Congress to regulate the holding of elections except where that power is expressly conferred by the Constitution as in the case of Members of Congress under Art. I, Sec. 4, conferring authority to alter state regulation on that subject.

There is likewise no power to police or regulate the acts of citizens in connection with elections generally. The power to police the acts of citizens is confined solely to those elections which the Constitution empowers Congress to regulate, as e. g., the election of Members of Congress. Even where such express power is conferred this court has held it is not to be extended by implication (Newberry v. United States, supra).

The majority opinion of the Court of Appeals of the District of Columbia fails to point out any provisions of the Constitution authorizing Congress to regulate elections at which the people of the state, pursuant to an act of the Legislature, select the electors who are to cast the vote of the state for President or any section of the Constitution authorizing Congress to police the acts of citizens engaged in the function.

It bases its decision upon the so-called elastic clause of the Constitution Art. I, Sec. 8, clause 18, conferring upon Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and holds that the duty resting upon the Senate and House of Representatives to elect the President when no candidate has the

majority in the electoral college is adequate to sustain the act in question.

It is respectfully submitted that the majority of the Court of Appeals of the District of Columbia erred in holding that the elastic clause of the Constitution was adequate to confer legislative authority upon Congress with respect to a matter which the Constitution in express terms has committed to the states.

It is further contended that the Court of Appeals erred in failing to apply the principles of law announced by this court in McPherson v. Blacker, 146 U. S. 1, wherein it was held that the word "appoint" as used in the Constitution with respect to Presidential electors was sufficient to include a popular election at which Presidential electors were voted for. Also, the decision of this Court in Fitzgerald v. Green, 134 U. S. 377, wherein the right of the state to punish a citizen for acts affecting the election of presidential electors was established. In that case this court declared:

> "Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State Legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of representatives in Congress. Constitution Art. I, Sect. 2, 3."

Also, the principle laid down by this court in Newberry v. United States, supra, wherein it was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4."

The majority opinion of the Court of Appeals also ignores the precedent established by the Electoral Commission in the Hayes-Tilden contest in which the precise question was the power of the Congress in the discharge of its duty in counting the electoral vote to go behind the Commission issued by state authorities and inquire into acts of citizens affecting election of presidential electors. In those cases it was held no such authority existed. (Hinds Precedents of the House of Representatives, Vol. 3, Sec. 1977, p. 285.)

It also overlooked the report of the select committee of the Senate made to the 72nd Congress after the indictment and demurrer in the instant case was filed, in which the committee reported a bill for an entire new Corrupt Practices Act, stating that it marked a departure in principle from the present law. (S. Rep. No. 20 accompanying S. 2316, 72nd Cong. page 977 Cong. Rec.)

VI.

The Majority Opinion Misconstrues the Statute

The question of statutory construction involved upon demurrer to the indictment was whether Congress intended by the Federal Corrupt Practices Act of 1925, to hold the treasurer of a political committee criminally liable for failing to report to the Clerk of the House of Representatives indirect contributions, not to the committee, but "for the committee" without any allegation that the contribution was ever received, or accepted by the committee or any agent thereof or that the treasurer had knowledge of the contribution.

The contention of petitioners is that the Federal Corrupt Practices Act of 1925, in Sec. 241 (c) Title 2 U. S. C. defines a political committee as one which accepts contributions for the specified political purpose.

Contributions are then divided into two classes: 1st. Direct contributions, those made directly to the committee. No such contribution is charged in this case. 2nd. Indirect contributions, those made for the committee. The distinction between direct and indirect contributions is clearly made in Secs. 242, 243, and 244. Sec. 242 requires that before contributions are accepted a political committee shall be appointed, which is required to have a chairman and treasurer. It makes it the duty of the treasurer of a political committee to keep a detailed and exact account of all contributions made to or for such committee. This is followed by Sec. 243, which defines the method by which indirect contributions, those made for the committee, are accounted for to the treasurer. Following this is Sec. 244 (upon which the indictment is based), defining the duties of a treasurer of a political committee with respect to the filing of reports of contributions with the Clerk of the House of Representatives. This section requires reports to be made of contributions: 1st, To the committee; 2nd, For the committee. Since Sec. 243 immediately preceding is the one which defines what is meant by a contribution "for the committee," the only logical and reasonable interpretation of the section is that the contributions "for the committee" which Congress intended that the treasurer should report are those accounted for to the treasurer as provided in Sec. 243.

Sec. 243 reads:

> "Accounts of contributions received. Every person who receives a contribution **for a political committee** shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

Contributions made for the committee which the treasurer is required to report are those which come into existence as provided in Sec. 243, and the duty of the treasurer to report with respect to such contributions is contingent upon whether there has been an accounting to the treasurer for such contributions, or other facts giving rise to the duty of the treasurer to demand an accounting. As to indirect contributions, therefore, it clearly never was the intention of Congress that the treasurer of a political committee should be indicted and prosecuted merely upon the bare allegation that some person made a contribution for the committee without alleging that the recipient accounted to the treasurer for the contribution or other facts which imposed the duty upon the treasurer to demand an accounting of the recipient of the contribution made for the committee.

It is plainly apparent from Sec. 243, that, as to indirect contributions, Congress intended that there should be an accounting to the treasurer of the political committee, and the duty of the treasurer to report cannot arise unless there is alleged and proved either that the party who received the funds accounted to the treasurer, or facts giving rise to the duty upon the part of the treasurer to demand an accounting of the recipient. Neither of these allegations is made in the indictment in the instant case. If the statute be construed to mean that the treasurer of a political committee can be held criminally liable, even to indictment for felony, for failure to report a contribution made for the committee without alleging that the contribution in question was ever accounted for to the treasurer, or other facts giving rise to a duty upon the part of the treasurer to demand an accounting, then such a construction would render the statute of doubtful constitutional validity.

Champlin Refining Co. v. Corporation Comm, 286 U. S. 210.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 89.

Under the theory held by the majority of the Court of Appeals respecting the criminal liability of the treasurer of a political committee to account for contributions not made to it but to others for it, it results that control as to liability to criminal prosecution would be removed entirely from the committee and be placed solely with persons in no way related to, or even known to the committee. If the construction contended for by the Government is correct, the liability of the treasurer of a political committee to prosecution would depend not upon the knowledge which imposes an obligation upon the treasurer to report, but alone upon whether someone made a contribution to any person for the committee, and on this latter theory the treasurer could be indicted even if such treasurer did not know of it.

Consider what would follow if such a construction were allowed to stand. The political enemies of a committee could make a contribution to a third person without its knowledge, render no accounting to the treasurer of the committee and if the treasurer failed to report it, secure his indictment and prosecution. Or a corporation, which is prohibited by law from making contributions, could make a contribution to a third person for a political committee, never account for it to the committee, or authorized or accepted by it, and the treasurer of the committee be subsequently indicted and prosecuted for failing to report a contribution which it never accepted and as a matter of law it could not accept. Or, if a person made a contribution to some one for a political committee, although the person receiving it was not authorized

to solicit funds, and the recipient pocketed the money and appropriated it to his own personal use, under the construction insisted upon by the Government the treasurer of the political committee could be indicted and prosecuted.

The majority opinion holds that the government may indict the treasurer of a political committee and place her upon trial upon the bare allegation that some one made a contribution for the committee, and this without alleging to whom the money was paid, that it was ever accepted by the committee or that she had knowledge of it.

Not only that, but the majority opinion declares, "It will always be presumed however, that the treasurer possesses knowledge of contributions which are made to or for the committee." Under such a construction of the statute the government upon trial if it proved the allegation of the indictment would be entitled to an instruction to the effect that the treasurer of a political committee is presumed to know of all contributions made "for the committee," although it had neither alleged nor proved that the contributions were received, or accepted, to whom they were made or that they were paid to any agent of the committee which is the very corpus deliciti of the offense. The responsibility of a treasurer of a political committee is to report only contributions accepted or used by the committee.

By a careful study of the majority opinion just quoted, creating a presumption of guilt, it will appear to the Court that in order to establish his innocence a defendant charged with crime must show a **bona fide exercise of reasonable care and diligence in the performance of the duties of the office.** Since good faith is a personal defense based largely upon the mental processes and the motives actuating the defendant, and since no one can explain those motives except

the defendant, and since no one else has knowledge of whether or not a given action was taken in good faith, the action of the Court in writing into the Corrupt Practices Act a requirement that the defendant must show his good faith by showing the exercise of reasonable care and diligence in the performance of the duties of his office, (i. e., in ascertaining when, by whom and how contributions were made to his committee,) amounts to a requirement that in order to show such good faith the defendant must take the stand and testify, whether or not any evidence had been adduced to show bad faith, breach of duty, or breach of obligation to report contributions. Otherwise, under the majority opinion, the trial Court might hold and charge that the **presumption of knowledge** written into the Corrupt Practices Act by the majority opinion was tantamount to being guilty, as charged, unless and until the defendant assumed the burden of proving his innocence and overcoming this presumption. To maintain this position, we submit, means an utter disregard of the fundamental presumption of innocence which belongs to every defendant and which attends him throughout the case.

This would be a direct violation of the rights of the defendant under the Vth amendment to the Constitution, reading as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself,** nor be deprived of life, liberty or property, **without due process of law;** nor shall private property be taken for public use, without just compensation."

Boyd v. United States, 116 U. S. 616.

The Corrupt Practices Act nowhere in express terms creates any prima facie presumption. If such presumption arises it grows out of judicial construction. That such a presumption is wholly unjustified and would be in direct disregard of the plain provisions of the act is clearly indicated by the fact that Sec. 243 provides the manner by which the recipient is to give to the treasurer of a political committee the information requisite for the making of reports and keeping the accounts respecting contributions made "for the committee." This shows the Congress recognized that a treasurer of a political committee would not at all times have knowledge of contributions made "for the committee" when such contributions are not made "to the committee" or an agent thereof. It declares:

> "Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution render to the treasurer a detailed account thereof."

The foregoing section of the Act unquestionably makes it the duty of the treasurer to demand an accounting of contributions made "for the committee" when the treasurer has knowledge of them, but it also provides for a situation where a contribution is made "for the committee" without the knowledge of the treasurer. In that case it is made the duty of the recipient within five days to account to the treasurer therefore.

A treasurer can, of course, demand an accounting only when he has knowledge of the contribution made "for the committee." Because of this Congress made provision for the situation which arises where the treasurer has no knowledge by making it the duty of the recipient to report within five days.

It is submitted, therefore, that in view of this clear statutory recognition of the fact that there are circumstances under which the treasurer may have no knowledge of a contribution made by some one "for the committee," there is no justification for the creation of a judicial presumption of knowledge under all circumstances.

In a campaign of nation-wide scope, such as is involved in the election of a President of the United States, it is absolutely impossible for the treasurer of a political committee to know of every instance when some individual citizen, may make a contribution "for the committee" or expend money "on its behalf." The presumption can reasonably arise only when it is shown that it is made to the committee or some agent thereof. Therefore, the construction of the act adopted by the majority of the Court of Appeals creating a presumption against the treasurer, it is submitted, falls within the class of an unreasonable presumption preferred to in McFarland v. American Sugar Refining Co., 241 U. S. 79, 86.

It is respectfully contended that Mr. Justice Van Orsdel in his dissenting opinion has correctly interpreted the statute, saying:

> "The **corpus delicti**, or the body of the crime as laid in the statute, consists of a political committee, as defined therein, receiving funds, using them, and failing to make a detailed report thereof to the Clerk of the House of Representatives. The indictment fails to allege that any funds ever came into the possession of the committee or any person connected with the committee. Thus it appears that the first essential element leading to the possible commission of the crime is lacking, and without possession there can be no distribution; hence, in the absence of these two fundamental elements, the failure to report is not a crime, since to meet the requirements of the statute

there is nothing to report. The essence of the crime is failing to report money that came into the possession of the committee, and from whom received, and funds paid out by the committee, and to whom such payments were made. In other words, the indictment fails to charge the crime defined in the statute, or any offense whatever. It is an elementary rule of criminal pleading, that, until the fact that the crime has been actually perpetrated and proved, in the manner alleged in the indictment, there can be no conviction."

Or as Mr. Justice Proctor of the Supreme Court of the District of Columbia said in his opinion sustaining the demurrer:

"A consideration of section 244, in the light of all other related provisions of the act, leads fairly to the conclusion that the legislative intention is to require the treasurer of a political committee to report only contributions received by him and those duly reported to or accounted for to him. Certainly it was not intended to hold one criminally responsible for failure to report a contribution of which he had no knowledge. This is a proposition advanced by the government to which I cannot assent. It calls for an unreasonable and harsh construction which is neither warranted by the nature of the act, its language, nor its intent.

"Nor can I accept the alternative contention that those counts which charge a **wilful** failure by Burroughs to report contributions made **for** the committee impute to her knowledge of contributions received by another. The term 'wilful,' as used in these counts, is merely an adoption of the word employed in section 252 to differentiate in the penalties between a purposed and intentional violation of the act and one occurring thoughtlessly or accidentally through inadvertence or mistake."

Even if the government were to prove every allegation made in this indictment it would not have established an offense under the act.

A certified copy of the entire record of said case, including the record in the Court of Appeals of the District of Columbia is hereby furnished. attached to and made a part of this application and marked exhibit "A" in compliance with Rule 38 of this Honorable Court.

Your petitioners are advised and believe that the judgment of the Court of Appeals of the District of Columbia in this case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provision of Section 240, Judicial Code.

Wherefore because of the said erroneous rulings of the Court of Appeals of the District of Columbia, as will be more fully expounded in the annexed brief, petitioners pray they be granted by this Honorable Court the writ of certiorari pursuant to the provisions of section 240 of the Judicial Code, that the writ be directed to the Court of Appeals of the District of Columbia; that on the return duly made to the writ and hearing of the case the judgment of the Court of Appeals of the District of Columbia herein be reversed.

Dated, Washington, D. C.
August 21, 1933.

ROBERT H. McNEILL,
Investment Building,
Washington, D. C.
Counsel for Petitioners.

CERTIFICATE OF COUNSELLOR

I, the undersigned do hereby certify that in my opinion the foregoing petition is well founded and that it is not interposed for the purpose of delay.

Dated, Washington, D. C.
August 21, 1933. ROBERT H. McNEILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. _____

ADA L. BURROUGHS, AND JAMES CANNON, JR.,
Petitioners.

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORATI.

PART II.

Petitioners propose to establish the following propositions:

1. The provisions of the Federal Corrupt Practices Act relating to presidential electors attempt to regulate political activities pertaining to their appointment.

2. The acts alleged in the indictment relate solely to attempts to influence their appointment.

3. The Constitution of the United States confers

upon the state the exclusive power of appointment of presidential electors and over all acts relating thereto **except the time of choosing** the electors.

4. The method of appointing presidential electors and the principle of the people acting by states was retained in the XII Amendment.

5. This Court has held that the XIVth Amendment did not take away from the state legislatures the exclusive power of appointing electors.

6. This Court has held that the term "appoint" in Art. II, Sec. 1, covers any method fixed by the state legislature, including a popular election at which the people vote for presidential electors.

7. This Court has conclusively settled the status of a presidential elector as a state officer, as respects both his appointment and attempts to influence his appointment.

8. The decisions of the state courts establish that the appointment of presidential electors is exclusively the function of the state and that, as to his creation, he is **a state officer.**

9. State, not Federal courts exercise jurisdiction to settle disputes regarding the manner of appointing presidential electors and acts relating thereto.

10. The IXth and Xth Amendments reserve to the states respectively or to the people all rights not expressly conferred upon the Congress by the Constitution.

11. There is no power in Congress to regulate elections generally:

a. Even as to members of Congress it is limited to "the times places and manner of holding elections for Senators and Representatives." The fixing of the qualifications of the voters, **as to them,** is reserved to the states.

b. The right of suffrage is controlled by the

states, exclusively, except as against discrimination.

12. In the absence of constitutional provision there is no authority in Congress to regulate the collateral acts of citizens influencing elections.

13. Text writers on constitutional law agree that the state legislature is possessed of plenary power with respect to the appointment of presidential electors and to regulate all acts relating thereto.

14. There is no inherent or implied power in Congress to regulate the appointment of presidential electors.

1. THE PROVISIONS OF THE FEDERAL CORRUPT PRACTICES ACT RELATING TO PRESIDENTIAL ELECTORS ATTEMPT TO REGULATE POLITICAL ACTIVITIES PERTAINING TO THEIR APPOINTMENT.

Sec. 241 (c) Title II U.S.C. of the Federal Corrupt Practices Act of 1925 defines the term "political committee," to include any committee which accepts contributions*** or makes expenditures **for the purpose of influencing or attempting to influence the election of***** presidential and vice presidential electors (1) in two or more states or (2) whether or not in more than one state if such committee*** (other than a duly organized state or local committee of a political party) is a branch or subsidiary of a national committee."

This Act, in so far as it applies to **presidential electors,** makes the duty of the treasurer of a "political committee" to file reports of contributions with the Clerk of the House of Representatives primarily contingent upon whether the contribution is accepted by the committee for the purpose of **influencing or attempting to influence the election of presidential or vice presidential electors,** and then upon whether the influ-

encing or attempting to influence the election of presidential electors is to be undertaken **in two or more states,** unless it is a branch or subsidiary of a national committee, in which event the treasurer is required to report contributions made for the purpose of influencing or attempting to influence the **election of presidential electors** within a single state. If the political committee happens to be that of a duly organized state or local committee of a political party, through which mediums vast sums of money are ordinarily spent in presidential campaigns, the statute exempts such committee from making any report whatsoever. It also does not apply to state and local committees of a movement which is **sectional** in character and not subsidiary to a **national** committee.

Every duty which the act attempts to require of a "political committee" has reference to acts done **before** a presidential elector comes into existence and deals solely with matters having to do with the appointment of an individual as an elector at a time when the matter is within the exclusive control of the state. The Constitution of the United States provides for the office of presidential elector but until an individual becomes a presidential elector by appointment in whatever method the state legislature may provide, the subject is wholly beyond any legislative control by Congress.

It is apparent that there is no purpose in the statute to affect electors after they actually function in that capacity. The Corrupt Practices Act differs from the regulations adopted by Congress, providing the mechanics for carrying into effect the mandates of the Constitution after the elector has been appointed, all of which carefully reserve to the states the exclusive power over the appointment of electors and all acts relating thereto. These are found in Title III of the United States Code, Chap. 1, which provides for the

machinery of recording the votes of the electors for President after these electors have been selected by the respective states, whereas this statute deals with a matter that is entirely confined to the period between the time the campaign began for their choice and their selection by the states.

2. THE ACTS ALLEGED IN THE INDICTMENT RELATE SOLELY TO ATTEMPTS TO INFLUENCE THEIR APPOINTMENT.

The gravamen of the charges against the defendants in each and every count in the indictment is the failure to report contributions made for a political committee **"for the purpose of influencing and attempting to influence" the election of presidential and vice presidential electors** or a conspiracy not to report contributions made for that purpose. There is no allegation that anything was done by the defendants at any time after an elector was appointed. The offense attempted to be charged, therefore, relates to matters done at a time when the whole subject was exclusively in the control of the state. Whatever authority, if any, Congress may possess over a presidential elector after he has been appointed, that question is not involved in this case, for the individuals whose names were on the ballots as candidates for appointment as presidential electors did not become electors until after their appointment as presidential electors.

See McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, 13 Sup. Ct. Rep. 3; Fitzgerald v. Green, 134 U. S. 377, 33 L. Ed. 951, 10 Sup. Ct. Rep. 586.

3 THE CONSTITUTION OF THE UNITED STATES CONFERS UPON THE STATE THE EXCLUSIVE POWER OF APPOINTMENT OF PRESIDENTIAL ELECTORS AND OVER ALL

ACTS RELATING THERETO, EXCEPT THE TIME OF CHOOSING OF THE ELECTORS.

The provisions of the Constitution of the United States relating to presidential electors deal with several aspects of that subject with respect to which the legislative authority of Congress may be distinctly different. These are, first, their appointment; second, the casting of the electoral vote; third, the count of the vote by Congress; fourth, protection of the citizen of the United States against discrimination covered by the XIVth, XVth, and XIXth Amendments. The first stage is the choosing or appointment of the electors. The statute and the indictment in the instant case deal only with matters affecting this.

Art. II, Sec. 1, of the Constitution of the United States, provides:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.***
>
> "The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

The sole power conferred upon Congress by this section is the right to fix the "time of choosing" and "the day on which they shall give their votes," which is required to be the same throughout the United States. When the framers of the Constitution intended to confer upon Congress any right to legislate with respect to the selection of presidential electors they provided for it in express terms, as, e. g., the right to fix the

time of choosing. All of the details with respect to the mode of selection and the incidents relating thereto are left by the Constitution to the people of the states to be fixed as the legislature may determine.

The scrupulous care with which the rights of the people, acting by states, were safeguarded in the process of the selection of a President is shown in the provisions which fix the number of electors to be appointed from each state. Under Art. II, Sec. 1 of the Constitution, the number equals the whole number of Senators and Representatives to which the state may be entitled in the Congress." The Representatives are required to be apportioned according to population, but in the Senate each state has two members—the smallest state as many as the largest. The number of members of the electoral college to which any state is entitled is required to be computed not only upon the basis of population but upon that of equipollency of the states in the Senate. In the event of a failure of any candidate for President to receive a majority of the electoral votes and the House is required to elect, each state has one vote.

The intention to make the choice of President free from any Federal domination or control in the appointment of electors is shown also by the provision in Art. II, Sec. 1, "but no Senator or Representative, or Person holding an office of Trust or Profit under the United States, shall be appointed an Elector" and by the further requirement that they shall meet in their respective states to cast their ballots.

Congress by Act of March 1, 1792, Chap. 8, Sec. 1, 1 Stat. 239 (now carried in U.S.C.A. Title III, Chap. 1), fixed the time when electors should be appointed as follows:

> "Section 1. **Time of appointing electors.** The electors of President and Vice President shall be

appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

Having fixed the time Congress has exhausted all power conferred upon it by the Constitution with respect to the appointment of the electors, save to protect against the discriminations protected by the XIVth, XVth and XIXth Amendments, hereinafter described.

4. THE METHOD OF APPOINTING PRESIDENTIAL ELECTORS AND THE PRINCIPLE OF THE PEOPLE ACTING BY STATES WERE RETAINED IN THE XIIth AMENDMENT.

The tie vote in the electoral college in the contest between Mr. Jefferson and Mr. Burr in 1800, which threw the election of a President into the House of Representatives, threatened serious consequences and renewed discussion of the subject of the mode of electing the President. This resulted in the XIIth Amendment to the Constitution, ratified in 1804. **Thus once more, not only Congress but the legislatures of the several states as well as the people had their attention directed to the subject.** It is highy significant, therefore, that in framing the amendment, no change whatsoever was made affecting the exclusive power of appointment committed to the state legislature under the original Constitution, Art. II, Sec. 1. The changes related solely to the casting of the ballot by the electors, requiring them to vote upon distinct ballots for President and Vice President and changing in some respects the procedure by Congress in the event no candidate for President or Vice President received a majority of the whole number of electors appointed. The amendment reads:

"The Electors shall meet in their respective

states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors **appointed;** and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. **But in choosing the President, the votes shall be taken by states, the representation from each state having one vote;** A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors **appointed,** and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole num-

ber shall be necessary to a choice. But no person constitutionaly ineligible to the office of President shall be eligible to that of Vice President of the United States." (Heavy print ours.)

Two things in the amendment should be noted. (1) It retains the use of the word "appointed" in each instance where it refers to the selection of electors, the same term used in the original Constitution, conferring such power upon the state legislature; and (2) it retains the principle that if the election be thrown into Congress the vote shall be taken by states, each state having one vote. If the people had desired to give to Congress any supervisory power over the appointment of presidential electors this would have been the time and place where it could have been most easily made. But the original clause of Art. II, Sec. 1 is unaffected and the policy of exclusive power over appointment of electors remains in the state legislatures.

5. THIS COURT HAS SETTLED THAT THE XIVth AMENDMENT DID NOT TAKE AWAY FROM THE STATE LEGISLATURES THE EXCLUSIVE POWER OF APPOINTING ELECTORS.

The only other provisions of the Constitution of the United States which empower Congress to legislate with respect to presidential electors are those contained in the XIVth, XVth and XIXth Amendments designed to protect citizens of the United States from discrimination by the state, or state agencies, on account of race, color or previous condition of servitude or on account of sex and to insure the equal protection of the law. These amendments do not apply to the acts of individuals or groups of individuals, such as a committee referred to in the indictment in this case.

James v. Bowman, 190 U.S. 127, 23 Sup. Ct. Rep. 678, 47 L. Ed. 979; Civil Rights Cases, 109 U.S. 3, 3 Sup. Ct. Rep. 18, 27 L. Ed. 835.

When the people intended to confer legislative authority upon Congress under these amendments, they provided for it in **express** terms. The XIVth Amendment contains the following:

> "Sec. 2.*** But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.***
>
> "Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In each of these amendments (XIV, XV, XIX) the legislative authority of Congress **is restricted solely to the protection against the particular type of discrimination covered by the constitutional amendment, through action by the state.** And in each instance the amendment in **express** terms provides for the enactment of appropriate legislation by Congress to effectuate that purpose. That neither the XIVth nor the XVth Amendment in any way altered the exclusive power of the state legislatures to appoint presidential electors, except to insure against the type of discrimination with which each amendment deals is conclusively settled by the decision of this Court in McPherson v.

Blacker where the exact question was raised. The Court said: 146 U.S., 38.

> "We decided in Minor v. Happerset, 21 Wall. 162 that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the 14th Amendment, and that that amendment does not add to these privileges and immunities, but simply furnished an additional guaranty for the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the state; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the 14th Amendment made all citizens voters. * * * (146 U. S., 38).
>
> **"The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States.** The first has not been granted or secured by the Constitution of the United States, but the last has been. United States v. Cruikshank, 92 U. S. 542; United States v. Reese, 92 U. S. 214. * * *
>
> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made. **Unless the authority vested in the legislatures by the second clause of section 1 of article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect."** (146 U. S., 40.) (Heavy print ours.)

The XIXth Amendment is in the precise terms of the XVth with the substitution of the word "sex" for the words, "Race, color or previous condition of ser-

vitude." It has been repeatedly held that the XVth Amendment does not confer upon colored men the right of suffrage, it only forbids discrimination. United States v. Reese, 92 U. S. 214, 23 L. Ed. 563. Therefore, as to acts relating to the choosing of electors, save for those matters to which the Constitution expressly refers, the states are possessed of plenary powers which by the very nature of the subject dealt with must be exclusive of any right of legislation by Congress.

6. THIS COURT HAS HELD THAT THE TERM "APPOINT" IN ART. II, SEC. 1, COVERS ANY METHOD FIXED BY THE STATE LEGISLATURE INCLUDING A POPULAR ELECTION AT WHICH THE PEOPLE VOTE FOR PRESIDENTIAL ELECTORS.

In McPherson v. Blacker, (supra), (1892) the precise point was definitely and conclusively settled. Mr. Chief Justice Fuller, in delivering the unanimous opinion of the court, said, with respect to the exclusive right of the state legislature of Michigan to control the method of appointment of presidential electors under the act of that state of May 1, 1891:

> "It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination. (146 U. S. at p. 27.)

Again the court declared:

> "If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive

why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. IN OTHER WORDS, THE ACT OF APPOINTMENT IS NONE THE LESS THE ACT OF THE STATE IN ITS ENTIRETY BECAUSE ARRIVED AT BY DISTRICTS, FOR THE ACT IS THE ACT OF POLITICAL AGENCIES DULY AUTHORIZED TO SPEAK FOR THE STATE, AND THE COMBINED RESULT IS THE EXPRESSION OF THE VOICE OF THE STATE, A RESULT REACHED BY DIRECTION OF THE LEGISLATURE, TO WHOM THE WHOLE SUBJECT IS COMMITTED." (146 U. S. at p. 25.)

And at p. 27:

"The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the LEGISLATURE EXCLUSIVELY TO DEFINE THE METHOD OF EFFECTING THE OBJECT."

And the court at p. 34 quoted approvingly a report made by Senator Morton, chairman of the Senate Committee on Privileges and Elections on the 28th of May, 1874, in which it was said:

"The appointment of these electors is thus placed ABSOLUTELY AND WHOLLY WITH THE LEGISLATURES OF THE SEVERAL STATES. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the su-

preme court of the state or any other agent of its will, to appoint these electors. THIS POWER IS CONFERRED UPON THE LEGISLATURES OF THE STATES BY THE CONSTITUTION OF THE UNITED STATES, AND CANNOT BE TAKEN FROM THEM OR MODIFIED BY THEIR STATE CONSTITUTIONS ANY MORE THAN CAN THEIR POWER TO ELECT SENATORS OF THE UNITED STATES. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people there is no doubt of the right of the legislature to resume the power at any time, FOR IT CAN NEITHER BE TAKEN AWAY NOR ABDICATED." Senate Rep. 1st Sess. 43d Cong. No. 395.

The Court further said at p. 35.

"IN SHORT, THE APPOINTMENT AND MODE OF APPOINTMENT OF ELECTORS BELONG EXCLUSIVELY TO THE STATES UNDER THE CONSTITUTION OF THE UNITED STATES."
* * *

And at p. 36:

"BUT WE CAN PERCEIVE NO REASON FOR HOLDING THAT THE POWER CONFIDED TO THE STATES BY THE CONSTITUTION HAS CEASED TO EXIST BECAUSE THE OPERATION OF THE SYSTEM HAS NOT FULLY REALIZED THE HOPES OF THOSE BY WHOM IT WAS CREATED. Still less can we recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

See also opinion below in the Supreme Court of

Michigan, 92 Mich. 377, 52 N. W. 469, 16L. R. A. 475, 31 Am. St. Rep. 587.

Re Opinion of the Justices of the Supreme Judicial Court of Maine, 118 Me. 552, 107 Atl. 705, 5 A.L.R. 1407, 1408 (1919), wherein that court said, regarding the authority of the state legislature in the matter of appointment of presidential electors:

> "The word 'appoint' as employed in subdivision 2 has been interpreted, to be sufficiently comprehensive to include the result of a popular election and to convey the broadest powers of determination." McPherson v. Blacker, 146 U. S. 1, 27, 36 L. Ed. 869, 874, 13 Sup. Ct. Rep. 3.
>
> "The language of sec. 1 subd. 2 is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states. 'Each state shall appoint in such manner as the legislature thereof may direct' are the significant words of the section, and their plain meaning is that each state is thereby **clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the Federal government,** except, of course, in case of attempted discrimination as to race, color, or previous condition of servitude under the 15th Amendment. The clause, 'in such manner as the legislature thereof may direct,' means simply that the state shall give expression to its will, as it must of necessity, through its lawmaking body, the legislature. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen." (Heavy print ours.)

The scope of authority of the state legislature over the matter of appointment of electors, with the single exception of fixing the time, is also well illustrated by

the decision of the Supreme Court of Tennessee in Vertrees v. State Board of Elections, 141 Tenn. 645, 214 S. W. 737. Prior to the XIXth Amendment to the Federal Constitution, the legislature of Tennessee by Acts 1919, Chap. 139, conferred a limited right of suffrage upon women, authorizing them to vote for presidential and vice presidential electors and certain municipal officers. The contention was made that the act was in violation of the state constitution. In sustaining the statute the court said (p. 739-740, 214 S. W.):

> "Since municipal officers are not referred to in the Constitution, and there is no provision in that instrument as to the manner of their selection, and since presidential and vice presidential electors are not referred to in the Constitution, and no mention is made as to the manner of their selection (and this doubtless could not be regulated by the state constitution), the conclusion inevitably follows that, under the provisions of section 4 of article 7 of the Constitution, the election of such officers 'shall be made in such manner as the Legislature shall direct.' It is thus competent for the Legislature to provide that such officers may be selected by other instrumentalities, or the legislature itself may select them. THE LEGISLATURE PERHAPS MIGHT CONFER THE POWER TO SELECT SUCH OFFICERS UPON THE WOMEN ALONE. THERE IS NO LIMITATION OF THE AGENCIES IT MAY EMPLOY." (Capitals ours.)

In State ex rel Barker v. Bowen, 8 S. C. 382, a case that grew out of the contest between Hayes and Tilden electors in South Carolina in 1876, the South Carolina Supreme Court said (p. 387):

> "There is nothing in the Constitution or laws of the United States that can be of the least service in determining which of the parties to the suit were

duly elected to the office in question. The only feature of the general proceeding to appoint electors that Congress is authorized by the Constitution to control is the day on which they shall be appointed—Art II. Authority to determine the mode of appointment is conferred by the Constitution (Art. II Sec. 1) on the legislature of the state. NO LIMITATION OR RESTRICTION AS TO THE MODE OF APPOINTMENT OR CERTIFYING THE FACT OF APPOINTMENT IS IMPOSED UPON THE STATE LEGISLATURE." (Capitals ours.)

The instant case does not involve any question of the power of Congress to legislate after the elector has been appointed, or of the right of Congress to judge of the regularity of votes cast for an elector when counting the electoral vote as required by the Constitution, upon which subject there is a conflict of authority. But in so far as these questions may be regarded as having been decided, the weight of authority supports the conclusion that Congress may not go behind the certificate of an elector issued by state authorities. The Electoral Commission appointed in 1877 to settle the dispute between the Hayes-Tilden electors found:

"There exists no power in this Commission and there exists none in the two houses of Congress in counting the electoral vote, to inquire into the circumstances under which the primary vote for electors was given." Hinds Precedents, House of Representatives, Vol. 3, Sec. 1977.

On this Commission were five Justices of the United States Supreme Court, five members of the House, and five from the Senate. Therefore, even as to matters arising after an elector has been appointed it is clearly indicated that Congress has no power except as provided in the Constitution itself.

7. THIS COURT HAS CONCLUSIVELY SETTLED THE STATUS OF A PRESIDENTIAL ELECTOR AS A STATE OFFICER, AS RESPECTS BOTH HIS APPOINTMENT AND ATTEMPTS TO INFLUENCE HIS APPOINTMENT.

This Court has had occasion to decide cases involving two aspects of the power conferred upon the state legislatures to appoint presidential electors under Art. II, Sec. 1 of the Constitution of the United States. One case dealt with the nature and scope of the power conferred upon the state legislature in selecting the mode of appointment. In McPherson v. Blacker, (supra) there was involved the validity of an act of the Michigan Legislature of May 1, 1891, which changed the method of appointment of presidential electors theretofore employed in the state and provided that there should be elected by the people one elector and an alternate elector in each of the twelve Congressional districts into which the state was divided, and an elector and an alternate elector-at-large to be elected respectively by the people in two districts into which the state was divided, known as the eastern and western districts. It was contended that the act of the legislature was in violation of the Constitution since appointment by districts was not an appointment by the state because all its citizens otherwise qualified were not permitted to vote for all of the presidential electors and were thus deprived of privileges and immunities guaranteed citizens of the United States by the XIVth Amendment. This case, therefore, went to the very heart of the question of the nature and completeness of the power vested in the state legislature to provide for the appointment of presidential electors. The Court in an unanimous opinion, after considering all of the sections of the Constitution involved, reviewing the debates in the constitutional convention, examining the

precedents set by the several states, respecting the mode of appointment of electors, upheld the Michigan statute. In its opinion the court said:

> "From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded **plenary** power to the state legislatures in the matter of the appointment of electors.
>
> "Even in the heated controversy of 1876-'77 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged: and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.
>
> **"In short, the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States."** (p. 877, 36L. Ed.). (Heavy print ours.)

This case, therefore, settled the law as to the full and complete authority of the state legislature to provide the mode of appointment.

In another case, Fitzgerald v. Green, 134 U. S. 377, the question was the right and power of the state to regulate and punish the acts of a citizen affecting the appointment of presidential electors. The defendant was convicted upon an indictment in the state court of Virginia charging him with having unlawfully voted for a Representative in Congress and for presidential and vice presidential electors, he being disqualified to vote by reason of a prior conviction for petit larceny. The defendant sought his release on a writ of habeas corpus, alleging that the offense for which he was convicted was a matter in the sole and exclusive jurisdiction of the Federal courts. This Court in a unanimous opinion upheld the full power of the state to regulate

acts affecting the appointment of presidential electors, declaring: 134 U. S. at p. 379.

> "The **only rights** and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two Houses of Congress, and the votes shall then be counted. Constitution, Art. 2, sec. 1; Amendments, art. 12.
>
> "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the Nation. **Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State Legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of representatives in Congress.** Constitution, art. 1, secs. 2, 3.

And at page 380:

> "Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States." (Heavy print ours.)

The indictment in that case charged the casting of an illegal vote both for a member of Congress and a presidential and vice presidential elector. The following reservation made by the court in its opinion is highly significant. It clearly recognized the distinction made

in the Constitution with respect to the power of Congress to legislate regarding the election of members of Congress, for which authority is expressly conferred by the Constitution, and its power with respect to acts influencing the appointment of presidential electors. The Court said: at page 380.

> "The question whether the State has concurrent power with the United States to punish fraudulent voting for representatives in Congress is not presented by the record before us. It may be that it has. Ex parte Siebold, 100 U. S. 371. But even if the State has no such power in regard to votes for representatives in Congress, it clearly has such power in regard to votes for presidential electors; **unaffected by anything in the Constitution and laws of the United States;** and the including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of habes corpus. (heavy print ours.)

It is to be noted that the court made no reservation with respect to the power of Congress to regulate the incidents growing out of the selection or appointment of presidential electors.

These cases definitely settle two propositions:

1. The plenary power of the state to provide for the method of appointment of presidential electors with the single exception as to fixing the time and the limitation against discrimination on account of race, color, previous condition of servitude or sex contained in the amendments to the Constitution.

2. They also settle the full, complete and exclusive power of the state to regulate the acts of a citizen influencing the selection of a presidential elector by cast-

ing an illegal vote. This Court upheld the power of the state to punish for that offense and by virtue of the broad grounds upon which it based its decision excluded any right on the part of the Federal Government to punish for that offense.

In the instant case, the charge is the failure to report contributions made to influence the election of presidential electors. McPherson v. Blacker established that a popular election is an appointment. The reasoning of this Court in its decision in the Green case indicates clearly that the power to regulate acts and to punish for offenses affecting their appointment is the exclusive function of the state. This by reason of the nature of the subject must be so. Whatever may be the power of Congress to legislate with regard to presidential electors **after** they are appointed and become such, it is very clear that until the appointment is made there is under the Constitution no subject matter with regard to which Congress can legislate. A candidate for presidential elector is not an elector until after his appointment. (See **The Electoral System,** Dougherty, infra.) The Constitution nowhere deals with candidates for presidential electors.

8. THE DECISIONS OF THE STATE COURTS ESTABLISH THAT THE APPOINTMENT OF PRESIDENTIAL ELECTORS IS EXCLUSIVELY THE FUNCTION OF THE STATE LEGISLATURE AND THAT, AS TO HIS CREATION, HE IS A STATE OFFICER.

The plenary power of the states to regulate the appointment of electors and acts with respect thereto is uniformly upheld by the state courts. The most recent decision upon the question was the unanimous opinion of the members of the Supreme Judicial Court of Maine in 1919, Re Opinion of Justices (supra). The ques-

tion arose before the adoption of the XIXth Amendment to the Constitution of the United States providing for woman suffrage. The legislature of Maine, by an act of March 28, 1919, passed an Act granting to women the right to vote for presidential electors. A petition was filed praying that the Act be submitted to a vote of the people under the referendum provision of the state constitution. The question at issue, therefore, was whether, since the Constitution of the United States provided that the legislatures should determine the mode of appointment of presidential electors, an Act of the legislature dealing with the method of appointment could be referred to the people in a referendum. The Court, after citing the applicable provisions of the Federal Constitution, said (p. 1408, 5 A. L. R.):

> "These two subdivisions comprise all the provisions of the Federal Constitution applicable to the point in issue here. Under Sec. 1, subd. 4, Congress is given the power to determine the date of holding presidential elections and of the meeting of the electors, **but that marks the limit of its Constitutional power.** Re Green, 134 U. S. 377, 33 L. Ed. 951, 10 Sup. Ct. Rep. 586. **All other powers in connection with this subject are expressly reserved to the states.** McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, 13 Sup. Ct. Rep. 3; Pope v. Williams, 193 U. S. 621, 48 L. Ed. 817, 24 Sup. Ct. Rep. 573.

Another recent case holding that presidential electors are state officers so far as their appointment is involved is in Re State Question No. 137, 244 Pac. 806, in which the Supreme Court of Oklahoma in an unanimous opinion construed the provisions of the state constitution in connection with the term "presidential electors" used in the Federal Constitution. The court declared:

> "Section 2 of article 5 of the (State) Constitution provides that:

> "'The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the state office receiving the highest number of votes at such election. * * *
> "'It is our opinion that the secretary of state properly designated the office of presidential elector as state officers, and used the vote cast therefor as the basis upon which to determine the number of signatures necessary'."

For a collection of cases see the note in 43 L.R.A. (N. S.) 282, et seq.

In Todd v. Johnson, 99 Ky. 548, 33 L.R.A. 399, 36 S. W. 987, presidential electors were held to be state officers within the meaning of the clause of the state constitution providing that vacancies in certain offices may be filled "in any election at which either city, town, county, district or state officers are to be elected." The case involved the question of when an election was to be held to fill a vacancy in the office of mayor of the City of Louisville occasioned by the death of that officer. The Constitution provided for a temporary appointment to fill such a vacancy, and the matter at issue was whether this was for the unexpired term of four years or was only until an election could be held as required by law.

In support of the proposition that a presidential elector is a state officer, the Court said:

> "He would seem, therefore, to be no more converted into a Federal officer because he is elected by the people to cast his vote for a presidential candidate than a member of the general assembly would be considered a Federal officer because, when elected, he casts his vote for a senator of the United States; for while the latter is supposed to do more than that, he does that much, and his status as a state officer is not affected."

There was a dissent by two justices in this case but

the majority opinion has become the settled law of the commonwealth, for it was cited and approved in the later cases of Donelan v. Bird, 118 Ky. 178, 80 S. W. 796; Hodge v. Bryan, 149 Ky. 110, 148 S. W. 21; Marshall v. Dillon, 149 Ky. 115, 148 S. W. 23. The dissenting minority were careful to point out in their decision the full power of the state to control all the incidents of appointment, for they said (33 L. R. A., 403):

> "IT MAY BE CONCEDED THAT WHEN THE STATE LEGISLATURE PROVIDES FOR THEIR APPOINTMENT BY A VOTE OF THE PEOPLE, UNDER THE POWER GIVEN BY THE FEDERAL CONSTITUTION, **THAT ELECTION IS HELD UNDER THE POWER AND SUBJECT TO THE CONTROL OF THE STATE AND FRAUDS IN ITS CONDUCT MAY BE PUNISHED BY THE STATE LAWS.**"

See also In re Absentee Voters Law (1921), 113 Atl. 293, 80 N. H. 595; Electoral College Case, 1, Hughes 571; 8 Fed. Cases 4336; State ex rel Barker and Bowen, 8 S. C. 382 (1876); Vertrees v. State board of Elections, 141 Tenn. 645, 214 S. W. 737 (1919); Fineran v. Bailey, 2 Fed. (2d) 363 (C. C. A. 5th Cir.) (1924).

9. STATE, NOT FEDERAL, COURTS EXERCISE JURISDICTION TO SETTLE DISPUTES REGARDING MANNER OF APPOINTING PRESIDENTIAL ELECTORS AND ACTS RELATING THERETO.

The plenary power of the state over the appointment of presidential electors is further emphasized by the fact that all questions dealing with their appointment are invariably settled by the state courts. The Federal courts have refused to entertain jurisdiction whenever

it has been sought to invoke their aid. The following are illustrative instances:

State v. Mountjoy, Mont. 271 Pac. 446 (1928).
State v. Stewart, 71 Mont. 358, 230 Pac. 366.
Vertrees v. State Board of Elections (1919), 214 S. W. 737; 141 Tenn. 645.
Breidenthal v. Edwards, 57 Kan. 332, 34 L. R. A. 146, 46 Pac. 469.
State v. Houser, 122 Wis. 534, 100 N. W. 964.
State v. Brodigan, 34 Nev. 486, 125 Pac. 699.
State v. Piper, 50 Neb. 25, 69 N. W. 378.
State v. Gifford, 22 Ida. 613, 126 Pac. 1060.
Sbarboro v. Jordan, 164 Cal. 51, 127 Pac. 170.
Spreckles v. Graham, 228 Pac. 1040; 194 Cal. 516.
In re Graves, 30 S. W. (2) 149 (Mo.).
Cunningham v. Cokeley, 79 W. Va. 60, 90 S. E. 546, L. R. A. 1917B, 718.

On the other hand, the Federal Courts have refused to entertain jurisdiction in matters relating to the appointment of presidential electors.

In Fineran v. Bailey, 2 Fed. (2d) 363 (1924), the Circuit Court of Appeals of the 5th Circuit affirmed the judgment of the District judge refusing relief to members of the Independent Progressive Party in the State of Louisiana who sought to have the names of individuals placed upon the ballot in that state to be voted upon for presidential electors, holding that it was an effort to make a writ of injunction serve the purpose of a writ of mandamus and a Federal Court has no power to issue a writ of mandamus except in aid of jurisdiction previously acquired.

In the Electoral College Cases (C. C. S. C. 1876), 1 Hughes (U. S.) 571, 8 Fed. Cas. No. 4336, in which the Federal Court, after a hearing upon a writ of habeas corpus, ordered the discharge of the members of the South Carolina Board of Election Canvassers who had

been committed for contempt of an order of the Supreme Court of the State requiring them to certify to it the election returns, the Federal Judge was careful to point out that the exercise of jurisdiction by the Federal Court was due to the fact that the returns upon election of members of Congress were involved.

The plenary power of the legislature to fix the manner of appointment of presidential electors is found in the development of the modern presidential preference primary. The legislature, in some states, has provided that the voters may express their preference by voting directly in a primary for the individual whom they prefer to be president, those to be candidates for presidential electors, also upon the names of individuals to be delegates to the national party convention at which the presidential candidate is to be nominated. These statutes vary.

In McCamant v. Olcott, 156 Pac. 1034, L. R. A. 1916E 706, 80 Oreg. 246, the Supreme Court of Oregon granted a writ of mandamus to require the Secretary of State to place upon the primary ballot the name of Hon. Charles E. Hughes as candidate for the Republican nomination for President, regardless of his wishes in the premises. The Court said:

> "THE OBJECT AIMED AT IS THE ASCERTAINMENT OF THE SENSE OF THE ELECTORATE of the particular party as to the proper person to be nominated by the national convention of such party, to the end that the delegates elected to represent their party in that body may be advised as to the wishes of their constituents. **The person thus designated as the voters' choice may or may not be a candidate in the sense of seeking or even desiring the nomination.** Primarily the object of the law is, not to serve the convenience of parties seeking a presidential nomination, but to enable the VOTERS TO EXPRESS THEIR PREFERENCE." * * *

> "The person whose name is thus placed upon the ballot is not a candidate in the sense of seeking or running for the office. The preferential vote cast in his favor does not nominate him for President, but is merely advisory to and morally obligatory upon the DELEGATES CHOSEN TO REPRESENT THE PARTY IN THE NATIONAL CONVENTION." (Capitals and black face ours.)

See also:

> Johnson v. Coyne, 47 S. D. 138, 196 N. W. 492 (1933).
> State v. Olson, 30 S. D. 57, 137 N. W. 561 (1912).

So plenary is the power of the legislature over the matter of appointment of electors that it can require the citizens of a state to vote for an entire block of electors representing a particular party and refuse to permit the citizen to vote his choice for individual electors. Thus, in State v. Pettijohn, 194 Pac. 328, the Supreme Court of Kansas said:

> "We regard it as clear that the words 'and no other space or margin shall be left in any such group of candidates' mean that no provision shall be made and no opportunity be given for placing a cross opposite the name of any individual elector included in the group. The manifest purpose of the provision is that one who wishes to vote for all the electors nominated by the party whose candidates for President and Vice President he favors may give effective expression to that wish by merely placing a cross in the square at the right of the names of the party's nominees for President and Vice President—just as under a former practice a vote for an entire party ticket was registered by placing a cross in a circle under the emblem at the head of the column."

The Court in its opinion pointed out that the same

practice obtained in Massachusetts. A similar ruling was made in New York in the case of Gerling v. Nichols, 206 N. Y. Supp. 191, where the objection was to the use of voting machines.

The development of these laws is but another evidence of the wide latitude allowed the state legislature in regulating the manner of appointing electors. The fact that new or varying methods of appointment have been employed does not in any way change the exclusive power of the state over the subject nor does it enlarge or grant to Congress any authority to legislate with respect to the subject, except to fix the time of choosing the electors.

10. THE IXth AND Xth AMENDMENTS RESERVE TO THE STATES RESPECTIVELY OR TO THE PEOPLE ALL RIGHTS NOT EXPRESSLY CONFERRED UPON THE CONGRESS BY THE CONSTITUTION.

> Constitution, Amendment IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> Constitution, Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The power to regulate and punish acts of citizens affecting a function committted to the states come clearly within the reservation of these amendments.

11. THERE IS NO POWER IN CONGRESS TO REGULATE ELECTIONS GENERALLY:

a. EVEN AS TO MEMBERS OF CONGRESS, IT IS LIMITED TO "THE TIMES, PLACES AND

MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES." THE FIXING OF THE QUALIFICATIONS OF THE VOTERS AS TO THEM IS RESERVED TO THE STATES.

Newberry v. United States, 256 U. S. 232, 249 involved a prosecution under the former Federal Corrupt Practices Act (held unconstitutional) against a candidate for the United States Senate and others for conspiracy to wilfully violate the act of Congress by contributing and expending money to procure the nomination to the United States Senate in a primary through the expenditure of an amount of money in excess of that allowed by law. Notwithstanding the express grant to Congress in Art. I Sec. 4, of the Constitution to regulate "the time, places and manner of holding elections for Senators * * * except as to the place of choosing Senators," the court held this conferred no implied authority to regulate a primary election, saying:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4."

The same principle was laid down in United States v. Gradwell, 243 U. S. 476, 37 Sup. Ct. Rep. 407, 6, L. Ed. 857. Thus even where there was an express grant of authority to regulate the election of Senators, this court declined to imply a power in Congress to punish acts influencing their nomination.

b. THE RIGHT OF SUFFRAGE IS CONTROLLED BY THE STATES, EXCLUSIVELY, EXCEPT AS AGAINST DISCRIMINATION.

It is settled that the Constitution does not define the privileges and immunities of citizens and the right of suffrage is not one of them. In Minor v. Happersett, 21 Wall, 162, 22 L. Ed. 627, 629, the court said of the XIVth Amendment:

> "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizens."

In McPherson v. Blacker, 146 U. S. 1, 36 L. Ed. 869, at p. 878, it is said:

> "The right to vote in the States, comes from the States, but the right of exemption from the prohibited discrimination, comes from the United States."

It is also settled that the prohibitions of the XIVth Amendment have reference to state action exclusively. Virginia v. Rives, 100 U. S. 313, 10 Otto 313, 25 L. Ed. 667; Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. Rep. 6, 51 L. Ed. 65.

Civil rights such as are guaranteed by the Constitution against state aggression cannot be impaired by the wrongful act of individuals unsupported by state authority in the shape of laws, customs, judicial or executive proceedings. Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18, 27 L. Ed. 835.

The XVth Amendment brought the right of citizens of the United States to vote within the protection of

Congress. The right of suffrage was not made coextensive with citizenship and this amendment did not confer the right of vote upon any one. It left the power to determine the qualifications of voters to the several states.

United States v. Reese, 92 U. S. 214; 23 L. Ed. 563.
Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 30 L. Ed. 766.
United States v. Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601, 27 L. Ed. 290.
Minor v. Happersett, 21 Wall. 162; 22 L. Ed. 627.
United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

A statute which attempts to punish purely individual action as distinguished from some act of the state or state agencies, cannot be sustained under the XVth Amendment. James v. Bowman, 190 U. S. 127, 23 Sup. Ct. Rep. 678, 47 L. Ed. 979.

The decisions under the XIVth and XVth Amendments settle conclusively that these amendments did not have the effect of conferring any general authority upon Congress to regulate elections. Its legislative authority is restricted simply to prevent the discriminations covered by these amendments and can be exerted only against acts of the state or state agencies.

12. IN THE ABSENCE OF CONSTITUTIONAL PROVISION THERE IS NO AUTHORITY IN CONGRESS TO REGULATE THE COLLATERAL ACTS OF CITIZENS INFLUENCING ELECTIONS.

It is elementary that Congress has no power to police the acts of citizens except with respect to a function committed by the Constitution to the Federal Government. United States v. DeWitt, 9 Wall. 41, 19

L. Ed. 593. Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835; United States v. Curikshank 92 U. S. 542, 23 L. Ed. 588; United States v. Reese 92 U. S. 214; 23 L. Ed. 563.

The function of appointing presidential electors and to police the acts of citizens affecting the discharge of this duty is by the Constitution expressly reserved to the state.

Hon. James M. Beck, in "The Vanishing Rights of the States" (1926), a discussion of the power of the Senate to refuse to seat a Senator (Vare) because of large campaign expenditures, said, p. 82:

> "There is a clear distinction between the machinery of 'elections' from the registration of the voter and the final casting of the ballot, over which Congress has undoubtedly this supervisory power, and the collateral and ancillary activities of citizens in selecting their candidates and in conducting their political campaigns.
>
> "To argue that the Federal government has dangerous extention of Federal power, of which no man could see the end. For example, Congress could require primaries as against the wish of a state, or could require conventions; or it could restrict candidates or define issues. Where would be the limit of such power?"

Or, as the matter was expressed by the Hon. Charles E. Hughes, as counsel, in his brief in the Newberry case, supra:

> A distinction is at once apparent between the regulations of the manner of holding elections, in order to protect the right of the voter in casting his vote and to secure a fair count of the vote, and the attempt to interfere with or control the activities of the people of the States in the conduct of political campaigns. In other words, if we assume the validity of regulations which pro-

tect each qualified voter in the exercise of his right to vote and which provide for the supervision of the casting of the vote and the proper ascertainment of the result of the vote, then the question is whether Congress can go further and attempt to control the educational campaign. Upon what ground can it be said that Congress can provide how many meetings shall be held, where meetings shall be held, how many speakers shall be allowed to speak for a candidate, how many circulars may be distributed, how many committees may act in behalf of a candidate, how they shall be organized and what shall be the limit of their honest activity?

"To hold that Congress may regulate such modes of popular expression, or may thus impose its will upon the extent of the political activity of the people of the States, is to ignore the fundamental limitations of the power of Congress. No one can read Hamilton's articles in the 'Federalist' with respect to this power and believe for a moment that there would have been any chance of ratifying the Constitution had it been proposed to delegate such a power."

The extent to which Congress may regulate the activities of citizens in influencing the election to Congress of candidates of their choice, where such acts do not relate to, order at the polls, the actual casting of the ballot, the preservation of it, the count, and the certification of the returns is undermined, for these questions have never been passed upon by this court. All of the cases arising under legislation enacted by Congress to control Congressional elections have related to elections, directly and have been connected with the holding of the election itself or matters arising thereafter. Diligent research has failed to disclose any case passing upon the power of Congress to regulate the inherent right of the citizen to exercise free speech, freedom of the press, liberty of action in going

from one place to another, advocating the merits of the candidate whose cause he espouses, a policy of government which he may favor, or opposing a candidate or a particular policy of government. So far as appears from judicial decisions, the legislative power of Congress with respect to such acts by citizens remains undefined, even as to elections of members of Congress. This was pointed out by the Hon. Charles E. Hughes in his brief in the Newberry case, quoted supra.

The instant case does not involve the question of the power of Congress to regulate expenditures to influence the election of members of Congress and the subject is referred to merely to show the extent to which the law may be regarded as judicially settled upon the extent of legislative authority possessed by Congress to regulate the election of Representatives and Senators where there is an express grant of power to Congress to regulate the "manner" of holding Congressional elections. There is no power in Congress to regulate the activities of citizens in the exercise of their political rights affecting the discharge of a function committed to the state by the Constitution.

The majority opinion insists that the Corrupt Practices Act of 1925 is a mere publicity requirement and is not a regulation of the appointment of electors or of acts affecting their appointment. The attempted distinction between a publicity requirement and the term regulation is a difference of words only. They are fundamentally the same. What does the act attempt to do? It requires that before any body of persons can associate to influence the election of Presidential electors in two or more states, or even in a single state, if they be a branch or subsidiary of a nationl organization, that they shall appoint a political committee. That political committee is required to have a chairman and a treasurer. The treasurer is required

to keep accurate and detailed accounts with the name and address of every person making a contribution "to" or "for the committee" of as much as $100 in a calendar year and the name and address as well as a receipted voucher for all expenditures made "by the committee" or "on behalf" of the committee exceeding $10.00 in amount. These are certainly regulations. They have nothing to do with publicity. The only publicity requirement is the filing of reports as treasurer at stated intervals with the Clerk of the House of Representatives. The Act (Section 251 Title 2 U. S. C.) further prohibits any corporation from making a contribution to influence the election of presidential and vice-presidential electors regardless of whether it shall be a corporation created by the State or Federal government. There is certainly a regulation. Also why the distinction between the exercise of power by Congress in one state, in two states, or in all of the states? If local committees in the several states may corrupt the presidential election, does it not just as much affect all subsequent acts required of Congress after the elector is appointed, such for example, as counting the electoral vote for President or deciding the vote in the House of Representatives in the event no candidate has a majority in the electoral college? Is the office of Chief Magistrate any less affected? These suggestions show the fallacy in the reasoning.

If Congress is possessed of an implied power to enact publicity regulations and to require committees to be constituted in a certain way, to keep their accounts as specified and to report on designated dates, where does that power end? May it limit the amounts that may be expended and prescribe the mode of conducting political activities by the citizens?

Even in the instance where the Constitution imposes a specific duty upon Congress to count the electoral vote in a Presidential election, it has been held that

this specific grant of authority carried with it no implied power to go behind the certification of the electoral votes of a state although fraud was charged. (Elec. Coll. Cases.) There is therefore absolutely no reason to sustain an implied authority in Congress with respect to matters affecting the appointment of Presidential electors which the Constitution has by definite language not only committed to the State Legislatures but in the same clause has granted to Congress in terms the only authority it was intended that it should exercise, namely, to fix the time of choosing.

13. TEXT WRITERS ON CONSTITUTIONAL LAW AGREE THAT THE STATE LEGISLATURE IS POSSESSED OF PLENARY POWER WITH RESPECT TO THE APPOINTMENT OF PRESIDENTIAL ELECTORS AND TO REGULATE ALL ACTS RELATING THERETO.

One of the most complete discussions of the electoral system is the work of Dougherty entitled, "The Electoral System of the United States." With respect to the nature of the power vested in the state legislatures respecting the appointment of presidential electors, at p. 20, he says:

> "This terse clause, the outcome of long debate in the convention, is so worded as to vest the manner of appointment of the electors to which each state is entitled, in the legislature of the state. There is no obligation on the part of the state to appoint electors. **It may, if it so wills, decline to participate in a presidential election and such failure actually happened in New York in 1789.** The state assembly, full of the partisans of Clinton, and strongly anti-federal, wished to vote for electors in joint convention with the Senate, which would have given the anti-federalists two United States Senators and ten electors. But

the upper House insisted upon a concurrent vote, which would have given it one Senator and five electors. As neither house would recede from its position, the state lost its electoral vote. Neither North Carolina nor Rhode Island had ratified the Federal Constitution when the first election occurred, and as a consequence neither of these states took part in it.

"**The legislature of each state is clothed with absolute power to determine in what manner the electors shall be appointed.** The word 'Appoint' is highly significant. It was designedly employed. It is not a democratic term; there is no implication of a popular election in it. The convention could not have employed a stronger expression to import the plenary authority of the state. So absolute is the power conferred upon each state legislature that it may, as was said by the eloquent Henry R. Storrs, of New York, in the House of Representatives in the spring of 1826, vest the appointment of electors in 'a board of bank directors, a turnpike corporation, or a synagogue.' The number of electors to which each state is entitled is equal to the whole number of Senators and Representatives to which the state is entitled in Congress. This clause is one of the compromises of the Constitution between the large and the small states. It recognizes the rights of a state as a separate entity, but also the right of majority rule. The electoral colleges, says Bancroft, were to be the 'exact counterpart of the joint convention of the two Houses in the representation of the states as units, as well as the population of the states.' A state, no matter how small in population, is entitled to two Senators and at least one Representative. This inequality of representation gave rise to the statement that 'the small states were the favorites of the Constitution,' but this apparent advantage is nullified under the general ticket system, which makes the election turn upon the vote in the large states.

(P. 395.) "As the Federal Constitution, in prescribing that each state may appoint electors in

such manner as the legislature of the state may direct, so conciliated the law-making body of the state about the state and its people that the legislature may defy the intentions of the state constitution and appoint electors in any manner it may please. **The legislature of any state in the Union may at any time, says Morton, take away from the people of that state the privilege of voting for presidential electors,** and no provision of the state constitution can successfully prevent it from doing so. Morton's colleagues upon the Senate Committee that reported the proposed constitutional amendment of 1874 evidently agreed with him, for the view of the committee was that:

"'The appointment of electors * * * is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their Senators of the United States, and that under the Constitution as it now stands it is in the power of any legislature to repeal the laws providing for the election of electors by the people, and take such election into its own hands. It may be said that this is not likely to be done; but the answer is, that it may be, and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do?'" (Heavy print ours.)

The writers of treatises on the Constitution use various terms describing the power of the state legislature to fix the mode of the appointment of presidential electors, which is variously characterized as "absolute," "plenary," "exclusive," and other expressions indicating that **all** power over the method of appointment and **all acts relating thereto is vested exclusively in the state legislature.** Thus in Willoughby on the Constitution, Vol. 3, 2d Ed., p. 1452, he says, "It will be observed that the Constitution gives **complete power** to the states in the election of presidential electors." In Sec. 939, regarding vacancies, he says,

"The states having plenary power over the appointment of electors may make provision for the contingencies of an elector dying between date of his appointment and the time of the casting of this vote or by sickness or accident being prevented from voting." In Burgess on "Political Science and Constitutional Law," Vol. 2, Chap. 3, page 216, it is said, **"To the point of the completion of the election of the electors the legislature of the state has plenary and exclusive power conferred upon it by this provision of the Constitution. * * * It appears to me manifest, therefore, that the original intention of the Constitution was to invest the legislature of the commonwealth with plenaty power over the appointment of presidential electors, except as to the time of their appointment and to exclude not only any interference of the general government in this sphere but also any interference not permitted by the legislature on the part of any organ of the commonwealth."** (Heavy print ours.)

The only specific study of the question of the constitutionality of the Federal Corrupt Practices Act as it applies to presidential electors is that of Professor Earl R. Sikes, in his work entitled, "State and Federal Corrupt Practices Legislation" (1928). He concluded the statute is unconstitutional, saying (p. 228):

> "The opinion must be reached that Congress has no constitutional power to regulate the use of funds in presidential elections."

It is interesting to note that Professor Sikes was one of the experts called before the select committee of the Senate of the 71st Congress to assist it in the preparation of new corrupt practices legislation. The Senate Committee in its report recommended the repeal of the present law, and the enactment of different legislation.

See also "Constitution of the United States," by Tucker, Sec. 162, p. 321; Story on the Constitution; Kent's Commentaries; Watson on the Constitution; 39 Cyc. United States p. 702.

It would be possible to encumber this brief with an indefinite number of quotations from authorities all supporting the proposition that the matter of the appointment of presidential electors and all acts influencing their appointment are within the exclusive control of the state. This principle is so well established and so elementary that it is thus stated in Encyclopedia Americana, Vol. 10, p. 88: "The electoral colleges are state bodies and their integrity as such is scrupulously guarded. * * * The method of appointment is left absolutely to the state legislature."

14. THERE IS NO INHERENT OR IMPLIED POWER IN CONGRESS TO REGULATE THE APPOINTMENT OF PRESIDENTIAL ELECTORS:

Art. I, Sec. 8 of the Constitution dealing with the legislative authority of Congress provides the Congress shall have power:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

This provision is the one relied upon by the majority of the Court of Appeals as authority in support of implied power upon the part of Congress to enact legislation. It is well settled, however, that this provision of the Constitution will support Congressional legislation only when some power with respect to the

subject matter is conferred upon Congress by the Constitution. In such case this provision authorizes Congress to determine the details of legislation necessary to effectuate the constitutional purpose. **It will not support legislation** when no power with respect to the subject is conferred by the Constitution.

This principle was succinctly stated in Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. Rep. 655, 51 L. Ed. 956, 970, wherein it was said of this section:

> * * * **"is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned."** (Heavy type ours.)

The state is vested with the power to appoint presidential electors. The election at which they may be voted upon, if the legislature elects that method, is held by state officers and at state expense. The citizens who exercise their suffrage do so pursuant to state law, subject to Federal protection only as against discriminations covered by the XIIIth, XIVth, XVth and XIXth Amendments. The state may enact police regulations pursuant to its police power to regulate the acts of citizens seeking to influence the preformance of a state function reserved to the state by the Federal Constitution. It is respectfully submitted that there is neither occasion nor justification for the invoking of the doctrine of implied power over a subject so thoroughly reserved to the states by the Constitution of the United States.

PART III.

INDICTMENT STATES NO OFFENSE

Not only is the statute unconstitutional, but the in-

dictment is insufficient to comply with the VIth Amendment. The indictment charges merely that one E. C. Jameson made specified contributions "for the committee." It does not allege who constituted the committee, to whom the contributions were paid, or that they were ever accepted by the committee.

Petitioners contend that contributions made "for the committee" are those referred to in Sec. 243 which provides how a contribution "for the committee" shall be accounted for to the treasurer. It reads:

> "Accounts of contributions received. Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received."

The petitioners' contentions respecting the proper construction of the statute are more fully set forth in the petition for writ of certiorari, pp. 10-18.

Congress, in enacting legislation dealing with Congressional campaigns and with Presidential elections, having a nation-wide scope, recognized throughout the distinction between direct and indirect political activities, i. e., the acts of the committee itself and acts of other persons "for" or "on behalf" of the committee. No committee can conduct all activities of a political campaign or even know of them. The act, therefore, distinguished between acts done by the committee itself and by others, for or in its behalf, and clearly delineated the different circumstances under which responsibility of the treasurer should arise. This distinction is made with respect to reports required of political committees, also with respect to reports required of candidates for the Senate, House of

Representatives, Delegates or Resident Commissioner to Congress, and applies alike to expenditures as well as to contributions. The difference made in the act between direct and indirect activities can be graphically shown by tabulating and classifying the statute with respect to the several phases of activity with respect to which it requires reports. They are:

(a) POLITICAL COMMITTEES—

REPORTS REQUIRED

Contributions are

1. Direct, i. e., those made to the committee. See Sec. 244 (a, 1) 242 (b, 1).
2. Indirect, i. e., those made for the committee. Sec. 243; 244 (a, 1) 243; 242 (b, 1).

Expenditures

1. Direct i. e., those made by the committee. Sec. 244 (a, 4, 5, 6) 242 (b, 3).
2. Indirect, i. e., those made on behalf of the committee 244 (a, 4, 5, 6), 242 (b, 3).

(b) CANDIDATES—REPORTS REQUIRED

Contributions

1. Direct, i. e., received by the candidate. Sec. 246 (1).
2. Indirect, i. e., received by any person on behalf of the candidate with his knowledge and consent. Sec. 246 (1).

Expenditures

1. Direct, i. e., made by the candidate. Sec. 246 (a, 2).
2. Indirect, i. e., made by any person on his behalf with his knowledge or consent. Sec. 246 (a, 2).

Pledges

1. Direct, i. e., by the candidate. Sec. 246 (a, 3).
2. Indirect, i. e., by any person for him with his knowledge or consent. Sec. 246 (a, 3).

(c) ACTIVITIES OF INDIVIDUALS—

REPORTS REQUIRED

Expenditures by individuals to influence election of candidates for Congress in two or more states when not made to a committee. Sec. 245.

Sec. 243 of the act plainly indicates that something more than mere knowledge of an indirect contribution is required of the treasurer of a political committee before there can arise the obligation upon the part of the treasurer to report it. For, in a supposititious case in which an unauthorized person receives a contribution for a political committee which is appropriated to his own use and never accounted for to the treasurer of a political committee, the treasurer might have knowledge that such a contribution was made for the committee but certainly would be under no duty to report it since the money never reached the treasurer's hands and was not used for political purposes at all. This would be true even though the contributor made the contribution in good faith thinking he was making it for the political committee and intended it to be used for political purposes. It is unreasonable to suppose that Congress intended to impose any liability upon persons serving as treasurers of political committees which it could not constitutionally exact.

That Congress did not intend any such hazard to be imposed upon persons exercising their political rights in influencing elections is further shown by reason of the fact that in Sec. 246 which relates to statements of campaign contributions to be filed by candidates for Senator or Representative it is provided that the statement shall contain "a correct and itemized account of each contribution received by him or **by any person for him with his knowledge or consent** from any source in aid or support of his candidacy for election." The members of Congress who voted for this measure clearly recognized that a candidate for Congress should not be indicted and subjected to prosecution merely because some person without his knowledge or consent somewhere in his district made a contribution to some other person to influence his election. Likewise, in

dealing with political committees generally, it did not impose any such unconscionable or unconstitutional responsibility, for in Sec. 244, dealing with the reports of indirect contributions made for the committee which the treasurer is required to report, although the draftsman did not use the words "made with his knowledge or consent," in Sec. 244, yet it is clear that contributions **"for the committee,"** referred to are those accounted for to the treasurer as required by Sec. 243 immediately preceding. Therefore, having defined in Sec. 243 that indirect contributions were those to be accounted for to the treasurer as therein provided, it was unnecessary in Sec. 244 to use the words, "with the knowledge or consent of the treasurer."

The gravemen of the offense in this case is the alleged failure of the treasurer of a political committee to report an indirect contribution made for the committee. It is submitted that in none of the counts of this indictment has the government alleged facts setting forth circumstances giving rise to the duty under the statute upon the part of the treasurer to make a report. The mere allegation that a contribution was made by one E. C. Jameson **for said committee** does not show to whom the contribution was paid, that it was ever accepted, accounted for to the committee, or other circumstances giving rise to the duty upon the part of the treasurer to make an accounting. These are essential elements of the offense under the statute where the government elects to prosecute for an indirect contribution, i. e., "for the committee" and their omission makes the indictment fatally defective. Merely following the statute is not always sufficient:

United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

Moens v. United States, 50 App. D. C. 15, 267 Fed. 317.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.
United States v. Johnson, 26 App. D. C. 136.
Miller v. United States, 136 Fed. 581.
People v. Wys, 25 Porto Rico, 483.
Duncan v. State, 7 Humphr. 148 (Su. Ct. Tenn.).

It is clearly apparent that the use of the word "wilfully" where it appears in the felony counts was intended by the draftsman of the indictment to indicate merely that the increased penalty provided under Sec. 252 was to be invoked. Furthermore, this Court has held that in an indictment under the National Banking Act charging that the accused "wilfully misapplied funds" is insufficient to inform him of the nature of the cause and accusation against him. In United States v. Britten, 107 U. S. 655, 27 L. Ed. 520, 525, is was said:

> "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like the words, 'embezzle,' as used in the statutes, or the words, 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one."

See also:

Felton v. United States, 96 U. S. 699; 24 L. Ed. 875.
Spurr v. United States, 174 U. S. 728, 43 L. Ed. 1150.

From a reading of the Federal Corrupt Practices Act of 1925, it is apparent that the words "wilfully violates" used in Sec. 252 (b) relating to penalties involves not only a conscious failure to report but also a purpose to do wrong, and the mere allegation of a wilful failure to report indirect contributions does not set forth sufficient allegations of fact with respect thereto to charge the offense against the treasurer. Thus, in Potter v. United States, 155 U. S. 438, 39 L. Ed. 214, where the charge was that the banker "did unlawfully, knowingly and wilfully certify a check" when there were no funds to meet it, the Supreme Court held that in order to convict under the statute a purpose to do wrong must be shown. The indictment in that case, unlike the one in the instant case, was based upon a statute the language of which was sufficient to acquaint the accused with the offense charged and related to the act of the defendant, himself, in certifying the check; whereas the offense in the instant case relates to a contribution alleged to have been made by a third person for the committee and not charged to have been accounted for to the treasurer or to any agent of the committee and without the allegation of other facts setting up a duty upon the part of the treasurer to demand an accounting.

It is essential that scienter be directly, and not inferentially alleged.

United States v. Carll, 105 U. S. 611.
Moens v. United States, 50 App. D. C. 15.
Pettibone v. United States, 148 U. S. 197, 206, 208.

If a statute upon which the indictment is founded only describes the general nature of the offense prohibited, the indictment, in repeating its language without averments disclosing the particulars of the alleged

offense, states no matters upon which issue can be formed for submission to a jury.

United States v. Hess, 124 U. S. 483, 486.
Keck v. United States, 172 U. S. 434, 437.
Moens v. United States, 50 App. D. C. 15.
Foster v. United States (C. C. A., Wash.) (1918) 253 Fed. 481.
Collins v. United States, (C. C. A.) (1918) 253 Fed. 609.
United States v. Marx, (D. C. Va.) (1903) 122 Fed. 964.
United States v. B. & O. R. R. Co., (D. C. W. Va.) (1907) 153 Fed. 997.
United States v. Bopp. (D. C. Cal.) (1916) 230 Fed. 723.
United States v. Robinson, (D. C. Okla.) (1920) 266 Fed. 240.

If the offense cannot be accurately and clearly described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent.

United States v. Mann, 95 U. S. 580, 585.
Moens v. United States, 50 App. Cas D. C. 15.

II.

Not only does the indictment in the instant case fail to charge knowledge, or any facts from which knowledge may be implied, but it is fatally defective in failing to allege facts giving rise to the duty of the treasurer to make a report, which is a necessary element of the offense where the prosecution is for an indirect contribution. In the instant case it is charged merely that contributions of money were made by Jameson, "for the committee." It is not alleged that the committee or the treasurer ever received or ac-

cepted or ratified or approved the same. This is clearly insufficient to state an offense under the act.

The intention of Congress in the Federal Corrupt Practices Act is clearly evidenced by other sections of the act. Sec. 241 declares that no contributions shall be accepted until a political committee is appointed, which shall have a chairman and a treasurer. Secs. 242, 243, and 244 draw clearly the line of demarcation between direct and indirect contributions. Sec. 243 defines indirect contributions as those made for the committee, and the act requires an accounting to the treasurer for such contributions. A similar distinction is also made with respect to expenditures. The act must be construed as a whole, and the intention of Congress determined not simply from the isolated clauses of a single section.

The unquestioned purpose of the act was to create responsible committees and to require that all of the funds received or expended by that committee should be handled by the treasurer. The treasurer is required to keep books showing the names and addresses of the persons making the contributions and similar records regarding expenditures. No treasurer can keep the records required under this act unless an accounting is made to him of contributions made for the committee and it was because of this that Sec. 243 provided how such an accounting should be made to the treasurer. Sec. 244, which immediately follows and which makes it the duty of the treasurer to report, so far as indirect contributions are concerned, required a report only of contributions made for the committee in the manner indicated by Sec. 243.

It is submitted that any lawful indictment of the treasurer under this statute must charge either that the contribution came into her hands or was accounted for to her.

Any other construction would make the treasurer

of a political committee responsible, without limit, for every contribution which the giver intended for the committee regardless of the actual disposition thereof, and put upon such treasurer the impossible burden of pursuing every rumor of irresponsible gossip respecting contributions alleged to have been made but never accounted for, at the peril of indictment for omission thereof from his report which he must swear to be true, and with respect to the items so reported although never coming into his hands, making him likewise liable to indictment if he is unable to procure a receipt or voucher showing the expenditure thereof by the recipient.

The only reasonable and workable construction of this law is to consider the treasurer's obligation to report as co-extensive with his duty to keep an account, and limited to such contributions as are actually received by him or accounted for to him under Sec. 243.

This indictment, therefore, fails to charge a crime in that there is no charge that the Jameson contributions ever came to the treasurer or were accounted for to her.

If the indictment fails as to Miss Burroughs, the treasurer, it necessarily fails with respect to Cannon, who is charged merely with being an accessory.

Upon the same reasoning, the counts for conspiracy must fail, since the alleged conspiracy was directed solely to the failure to file reports as alleged in the preceding counts.

The members of Congress are actively engaged in politics. They have been elected to public office. They know something of the methods and hazards of political campaigns. They were cognizant of the fact that in a campaign on a nation-wide scale it was entirely possible that individuals might make contributions for political committees which might not come directly to

the notice of the treasurer. In connection with their own candidacies they made clear that they were not to be accountable for contributions made by persons on their behalf except those made with the candidate's knowledge and consent. (Sec. 246, a-2) By providing the duty of a recipient of an indirect contribution for any other political committee to account to the treasurer for such contribution there is clearly evidenced an intent not to hold such treasurer to any higher degree of accountability. Congress made very clear in the structure and language of the act the distinction between legal accountability of a treasurer with respect to the two types of contribution. This is a penal statute and it should be strictly construed.

In view of the entire act and its purpose it is respectfully submitted that it was not the intention of Congress to allow contributors of funds for the committee to determine the liability of the treasurer, but rather the obligation of the treasurer is dependent upon whether the funds are accounted for to him, or other facts showing a duty upon the part of the treasurer to demand an accounting. If the government in this case was unable to allege that these funds were accounted for to the treasurer or that the treasurer had knowledge of them, **it has its remedy against the recipient under Sec. 243, who failed to account to the treasurer for them, if the facts were sufficient to justify such an indictment.**

THIS COURT'S CONSTRUCTION OF FORMER CORRUPT PRACTICES ACT REFUTES MAJORITY THEORY.

The unsoundness of the majority's construction and the distinction between direct and indirect political activities is well shown by the decision in Newberry v. United States (supra.) In that case the court was unanimous in the judgment reversing the trial court; five members of the court placing their decision on the

ground that the former Corrupt Practices Act was unconstitutional in so far as it attempted to regulate expenditures in Congressional primaries, but four of the members of the court based their opinions upon the construction of the statute upon which the indictment was based.

The indictment charged that Newberry and 134 others unlawfully and feloniously did conspire, combine, confederate and agree together to commit an offense against the United States, to-wit: the offense on the part of Truman H. Newberry of wilfully violating the Federal Corrupt Practices Act of 1910 as amended by giving, contributing, expending, using and by causing to be given, contributed, expended and used to procure his nomination for election as Senator, a sum in excess of $3,750 allowed by law.

The demurrer filed challenged the constitutionality of the act insofar as it attempted to regulate primary elections but did not raise the question of the sufficiency of the indictment as a pleading, but the Court was called upon to construe that act as it related to the responsibility of a candidate for contributions or expenditures made by him—or caused to be made by him and contributions and expenditures made independently by others in behalf of his candidacy. This is clearly set forth in the language of Chief Justice White when he says, 256 U. S. 232, 274:

> "The error in the instruction plainly resulted from a failure to distinguish between the subject with which the statute dealt—**contributions and expenditures made or caused to be made by the candidate—and campaign contributions and expenditures not so made or caused to be made, and therefore not within the statute.** * * *
>
> "To treat the candidacy, as did the charge of the court, as being necessarily the cause, without more, of the contribution of the citizen to the cam-

paign, was therefore to confound things which were wholly different, to the frustration of the very object and purpose of the statute. To illustrate: Under the instruction given, in every case where, to the knowledge of the candidate, a sum in excess of the amount limited by the statute was contributed by citizens to the campaign, the candidate, if he failed to withdraw, would be subject to criminal prosecution and punishment. So, also, contributions by citizens to the expenses of the campaign, if only knowledge could be brought home to them that the aggregate of such contributions would exceed the limit of the statute, would bring them, as illustrated by this case, within the conspiracy statute, and accordingly subject to prosecution. Under this view the greater the public service, and the higher the character of the candidate, giving rise to a correspondingly complete and self-sacrificing support by the electorate to his candidacy, the more inevitably would criminality and infamous punishment result both to the candidate and to the citizen who contributed.

"As it follows from the considerations which I have stated that the judgment below was, in my opinion, clearly wrong, and therefore should be reversed." (Heavy print ours.)

Mr. Justice Pitney expressed the matter thus:

"A reading of the entire act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein. Of course, it does not mean that he must be alone in expending or causing to be expended the excessive sums of money; if he does it through an agent or agents; or through associates who stand in the position of agents, no doubt he is guilty; 'qui facit per alium facit per se;' but unless he is an offender as a principal, there is no offense. Section 332, Criminal Code (35 Sta. at L. 1152, chap. 321, Comp. Stat. Chap. 10,506, 7 Fed. Stat. Anno. 2d ed. p.

984), declares: 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.' Clearly this makes anyone who abets a candidate in expending or causing to be expended excessive sums a principal offender; **but it cannot change the definition of the offense itself as contained in the Corrupt Practices Act,** so as to make a candidate a principal offender unless he directly commits the offense denounced. **Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.** * * *

"His mere participation in the activities of the campaign, even with knowledge that moneys spontaneously contributed and expended by others, without his agency, procurement, or assistance, were to be or were being expended, would not of itself amount to his causing such excessive expenditure. The effect of the instruction that was given may well have been to convey to the jury the view that * * * Mr. Newberry's participation in a campaign where money in excess of the prescribed limit was to be expended, even without his participation in the contribution or expenditure of such money, amounted to a conspiracy on their part to commit an offense against the act." (Heavy print ours.)

In construing the former Corrupt Practices Act this Court clearly recognized the distinction made between direct and indirect political activities. It held that a candidate would not be liable to conspiracy for the expenditure of an amount in excess of that fixed by law, **even though he knew of it,** unless it was **shown that either he personally or through his agents caused the contributions or expenditures.** Mere knowledge was insufficient, so in the instant case the present Corrupt Practices Act recognizes throughout the dis-

tinction between direct and indirect political activities and it clearly never was the intention of Congress to hold the treasurer of a political committee liable for conspiracy to fail to report contributions on the bare allegations that someone made contributions "for the committee" without any charge showing to whom the contribution was made, or the allegation of any other facts charging the treasurer with knowledge, or giving rise to the duty to demand an accounting.

CONCLUSION

It is respectfully submitted that the majority of the Court of Appeals of the District of Columbia erred in holding the section of the Federal Corrupt Practices Act upon which indictment was based to be constitutional, also that the indictment is sufficient to state an offense under the statute.

Conscientiously believing that the constitutional rights of the petitioners have been jeopardized by the majority decision of the Court of Appeals of the District of Columbia and that the grave question of constitutional law as well as of statutory construction involved in this case of first impression under the Federal Corrupt Practices Act of 1925 should be finally settled in the public interest, it is respectfully submitted that the writ of certiorari should issue.

Respectfully submitted,

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